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06 UNITED STATES DISTRICT COURT  
07 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

08 JACK K. STEIN, ) CASE NO. C06-1047-MJP  
09 Plaintiff, )  
10 v. ) SECOND REPORT AND  
11 KENNETH QUINN, ) RECOMMENDATION  
12 Defendant. )  
13

14 Plaintiff is a Washington state prisoner proceeding *pro se* and *in forma pauperis* in this  
15 action brought pursuant to 42 U.S.C. § 1983. The essence of plaintiff's complaint is that prison  
16 officials violated his constitutional rights when they removed eleven boxes of legal materials from  
17 his cell without proper justification. The Court issued an Order to Show Cause on October 31,  
18 2006, advising plaintiff to address certain deficiencies in his complaint. (Dkt. #15). Plaintiff has  
19 filed a response to the Order to Show Cause. (Dkt. #16). Having reviewed the response, the  
20 Court recommends that the complaint and this action be dismissed without prejudice.

21 PROCEDURAL HISTORY

22 On August 21, 2006, plaintiff was granted *in forma pauperis* status and his 1983 complaint

01 was filed. Upon screening the complaint, the undersigned United States Magistrate Judge noted  
02 that it appeared that plaintiff was seeking similar relief from the state court. Consequently, on  
03 August 22, 2006, the undersigned issued a Report and Recommendation (“R&R”) recommending  
04 that the instant lawsuit be dismissed without prejudice pursuant to the abstention doctrine  
05 articulated in *Younger v. Harris*, 401 U.S. 37 (1971). (Dkt. #8).

06 On October 27, 2006, the District Judge assigned to this case, the Hon. Marsha J.  
07 Pechman, adopted the R&R in part. (Dkt. #14). Judge Pechman concluded that *Younger* was  
08 implicated but that a stay, rather than dismissal, would be required if state court proceedings were  
09 still on-going. Because the record was not clear, Judge Pechman remanded the case to the  
10 undersigned to determine whether state proceedings had terminated and whether the instant action  
11 should proceed or be stayed.

12 In accordance with Judge Pechman’s Order, the undersigned issued an Order to Show  
13 Cause (“OSC”) on October 31, 2006, directing plaintiff to address whether his state court  
14 proceedings had terminated. (Dkt. #15). The Court also directed plaintiff to address three other  
15 areas of concern regarding his complaint:

16 (1) Whether the eleven boxes had been destroyed, as indicated by one of the exhibits

17 he had provided, rendering the instant lawsuit moot;

18 (2) Whether the removal of the eleven boxes had caused him “actual injury” sufficient

19 to establish standing; and

20 (3) Whether plaintiff agreed to discontinue the use of inappropriate language in his

21 pleadings before this Court.

22 (Dkt. #15 at 2-3).

01 On November 13, 2006, plaintiff filed a response to the OSC. He addressed each of the  
02 above concerns in his response and the Court will address them in turn.

03 DISCUSSION

04 1. Whether plaintiff's proceedings in state court have terminated.

05 In the OSC, the Court noted that it appeared that plaintiff had one action still pending in  
06 the Washington Court of Appeals, Case No. 587684. The Court directed plaintiff to address  
07 whether the pending state proceeding had terminated and, if so, to provide evidence thereof. (Dkt.  
08 #15 at 2).

09 Plaintiff in his response concedes that Case No. 587684 is still pending in state court.  
10 (Dkt. #16 at 2). However, he asserts that the state court proceeding is against a different  
11 respondent and has nothing in common with the instant proceedings. Therefore, plaintiff contends  
12 that a stay under *Younger* is not required.

13 Plaintiff does not support his assertion with any documents from the state court showing  
14 that the proceeding there involves wholly different claims. Thus, he does not conclusively show  
15 that the instant proceedings should not be stayed pursuant to *Younger*. However, in light of the  
16 other deficiencies noted below, the Court need not rest its recommendation solely upon a finding  
17 that *Younger* precludes the instant lawsuit from advancing.

18 2. Whether the eleven boxes had been destroyed, rendering the instant lawsuit moot.

19 In response to the Court's directive that plaintiff show that the eleven boxes have not been  
20 destroyed, as indicated unequivocally by one of the exhibits filed earlier (Dkt. #7, Ex. 17), plaintiff  
21 asserts that two prison officials have told him that the boxes still exist. (Dkt. #16 at 7). However,  
22 plaintiff does not identify these prison officials nor does he support his assertion with any evidence,

01 such as statements from the prison officials themselves. Consequently, he has not satisfied this  
02 Court's concern that the instant lawsuit seeking return of the boxes would be an exercise in futility  
03 because the boxes have been destroyed.

04 3. Whether the removal of the eleven boxes has caused plaintiff "actual injury."

05 In the OSC, the Court advised plaintiff that, in order to state a claim based upon the loss  
06 of the boxes, he needed to allege facts establishing that he had suffered an "actual injury," a  
07 jurisdictional requirement that flows from standing doctrine and may not be waived. *See Lewis*  
08 *v. Casey*, 518 U.S. 343, 349 (1996). (Dkt. #15 at 2). To show "actual injury," a plaintiff must  
09 allege "actual prejudice with respect to contemplated or existing litigation, such as the inability to  
10 meet a filing deadline or to present a claim." *Lewis*, 518 U.S. at 348.

11 In his response to the OSC, plaintiff disputes that he is required to show "actual injury,"  
12 and contends, instead, that prejudice from the loss of the boxes may be presumed. (Dkt. #17 at  
13 7). Plaintiff cites no authority to support this contention. In addition, plaintiff asserts in a  
14 conclusory fashion that if actual injury is required, he has met that standard already, and can  
15 provide further evidence of actual injury at an evidentiary hearing. (*Id.*)

16 Plaintiff's response is inadequate to answer the Court's concern that he has not established  
17 actual injury and consequently has not met the jurisdictional requirement of standing.

18 4. Whether plaintiff agrees to discontinue the use of inappropriate language in his  
19 pleadings.

20 In the OSC, the Court noted that plaintiff had referred to a defendant in this action as "an  
21 EVIL and dishonest black man. . . ." (Dkt. #15 at 3) (emphasis in original). The Court advised  
22 plaintiff that such language was inappropriate in a court of law, and cited Local Rule GR 9 as

01 prohibiting the presence of bias or prejudice in any form in litigation in this district. Plaintiff was  
02 warned that further instances of abusive language would result in sanctions, including the possible  
03 dismissal of this action.

04 In his response to the OSC, plaintiff states that he fails to see how the above-quoted  
05 language is inappropriate. (Dkt. #16 at 8). He therefore provides no assurance that he will refrain  
06 from using such language in the future.

07 Again, the Court finds plaintiff's response to be inadequate. By failing to recognize the  
08 problem, plaintiff's response wholly ignores his duty to follow in the future the rules governing  
09 bias-free litigation in this Court.

10 CONCLUSION

11 In sum, plaintiff's response to the OSC falls short on all counts. Plaintiff has failed to  
12 conclusively show that *Younger* does not apply, or to adequately address the deficiencies in his  
13 complaint. Accordingly, the Court recommends that the complaint and this action be dismissed  
14 without prejudice.<sup>1</sup> A proposed Order accompanies this Report and Recommendation.

15 DATED this 8th day of December, 2006.

16   
17 Mary Alice Theiler  
18 United States Magistrate Judge  
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21 <sup>1</sup> In so recommending, the Court is mindful that if *Younger* were the sole issue before the  
22 Court, then a stay would be the appropriate remedy instead of dismissal. See *Gilbertson v.*  
*Albright*, 381 F.3d 965 (9th Cir. 2004) (*en banc*).